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**UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

Case No. 3:07-cv-06050

ROSE HEFNER, REP. OF :  
IRVING HEFNER, (DECEASED), :  
ET AL. :

Plaintiff, :

v. :

SMITHKLINE BEECHAM :  
CORPORATION :  
d/b/a GLAXOSMITHKLINE and :  
MCKESSON CORPORATION :

Defendants :

PLAINTIFF'S MOTION  
AND MEMORANDUM  
IN OPPOSITION TO  
DEFENDANTS'  
MOTION TO STAY

HEARING:  
DATE: January 14, 2008  
TIME: 2:00 p.m.  
COURTROOM: 15  
JUDGE: Marilyn Hall Patel

PENDING RULING ON MOTION TO RELATE CASES, THIS DOCUMENT RELATES TO  
THE FOLLOWING CASES:

*UPSHAW v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE and  
MCKESSEON CORPORATION*, Case No. 3:07-cv-05891-MHP

*HALL v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE and  
MCKESSON CORPORATION*, Case No. 3:07-cv-05887-JL

*FISHER v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE and  
MCKESSON CORPORATION*, Case No. 3:07-cv-05889-MMC

*JEFFERSON v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE  
and MCKESSON CORPORATION*, Case No. 3:07-cv-05888-SC

1            *THORNTON v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE*  
2            *and MCKESSON CORPORATION*, Case No. 3:07-cv-05890-JL

3            *BONE, ET AL v. SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE*  
4            *and MCKESSON CORPORATION*, Case No. 3:07-cv-05886-MHP

5  
6            **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

7  
8            1)        PLEASE TAKE NOTICE that on January 14, 2008, at 2:00 p.m. in Courtroom 15 of  
9            the above-entitled courthouse, located at 450 Golden Gate Avenue, San Francisco, California  
10           94102, or as soon thereafter as the matter may be heard, plaintiffs hereby move this Court to  
11           OPPOSE defendants' motion to stay these proceedings, pretrial activities, Rule 26 disclosures, and  
12           any other discovery and pretrial deadlines.

13                            **PLAINTIFFS' MOTION AND MEMORANDUM**  
14                            **IN OPPOSITION TO DEFENDANTS' MOTION TO STAY**

15            **I.        INTRODUCTION**

16            Plaintiffs respectfully request this Court deny Defendants' Motion to Stay all Proceedings  
17            Pending Transfer by the Judicial Panel on Multidistrict Litigation ("JPML"). Defendants seek a stay  
18            of this action in order to prevent this Court from ruling upon the fundamental question of federal  
19            question jurisdiction posed by Plaintiffs' pending Motion for Remand. Defendants argue that a stay  
20            pending transfer by the JPML to MDL No. 1871, over which the Honorable Cynthia Rufe is  
21            presiding, will "conserve the Court's and parties' resources, avoid duplicative litigation and prevent  
22            inconsistent rulings on issues that arise repeatedly in Avandia litigation. (Def's Mem. in Supp. Of  
23            Mot. To Stay at 2).

24            Courts often analyze three factors when deciding whether to issue a stay of proceedings  
25            pending a decision by the Panel on transfer: (1) the judicial resources that would be saved by  
26            avoiding duplicative litigation if the cases are in fact coordinated; (2) hardship and inequity of the  
27            moving party if the action is not stayed; and (3) potential prejudice to the non-moving party. *See*

1 *Leeson v. Merck & Co., Inc., et al.*, 2006 U.S. Dist. LEXIS 3096, 13, (E.D. Cal. 2006) citing *Rivers*  
2 *v. The Walt Disney Co.*, 980 F.Supp. 1358, 1360-62 (C.D. Cal. 1997); *see also Landis*, 299 U.S. at  
3 254-55; *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9<sup>th</sup> Cir. 1962).

4 First, with all due respect, there should be no transfer at all because there simply is no  
5 substantial and disputed federal question which arises from the Plaintiffs' well pleaded complaint  
6 and thus there is no federal jurisdiction. Beyond this, as will be outlined below, application of these  
7 factors reveals that: (1) a stay would not serve the interests of judicial economy or preserve  
8 resources; (2) defendants will suffer no hardship if the matter is not stayed; and (3) Plaintiffs will  
9 suffer undue prejudice if this case is needlessly delayed.

## 10 II. STATEMENT OF THE CASE

11 Plaintiffs filed a complaint against SmithKline Beecham Corporation d/b/a  
12 GlaxoSmithKline ("GSK") and McKesson Corporation ("McKesson") pursuant to Cal. Bus. &  
13 Prof. Code § 17200, et seq., the Consumer Legal Remedies Act, Civ. Code § 1750 et seq.  
14 ("CLRA"), and other state law claims in California State Court. All of Plaintiffs' claims are based  
15 entirely on state statutes and California common law.

16 Notwithstanding the absence of any claim in Plaintiffs' well pleaded complaint based on  
17 federal law, Defendants removed this case to federal court, alleging that Plaintiffs state law claims  
18 raise substantial issues of federal law and, therefore, confer jurisdiction under 28 U.S.C. § 1331 or,  
19 alternatively, that Plaintiffs' claims are preempted by federal law.

20 Plaintiffs moved to Remand on the basis that there was no claim arising under federal law,  
21 nor any substantial or disputed federal question in the well pleaded complaint. Subsequently,  
22 Defendants filed this motion asking this Court to stay all proceedings, including any jurisdictional  
23 inquiry, pending possible transfer of this case by the JPML to the Avandia MDL.

Following Plaintiffs' Motion to Remand to state court, a Conditional Transfer Order (CTO-4) was issued December 4, 2007, by the Judicial Panel on Multi-District Litigation seeking to transfer Plaintiffs' actions to the Eastern District of Pennsylvania for consolidated pretrial proceedings. This transfer was opposed by Plaintiffs via an Opposition to Conditional Transfer Order filed December 10, 2007.

## ARGUMENT

### I. THIS COURT IS UNDER NO OBLIGATION TO STAY THE CASE AND JUDICIAL ECONOMY IS BEST SERVED BY THIS COURT ADDRESSING THE JURISDICTIONAL ISSUE.

Courts have inherent discretionary authority over motions to stay proceedings. *See Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936). Further, the JPML Rules specifically hold this Court is under no obligation to issue a stay. Indeed, contemplating the situation presented in this case, the Rules were expressly written to allow this Court to proceed:

The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 **does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.**

J.P.M.L Rule 1.5 (emphasis added). Envisioning the precise situation presented to this Court, the Manual for Complex Litigation specifically provides that the district court may rule on a motion for remand before the Panel acts on a motion to transfer.

During the pendency of a motion (or show cause order) for transfer...the court in which the action was filed retains jurisdiction over the case...The transferor court should not automatically stay discovery;...postpone rulings on pending motions, or generally suspend further proceedings. When notified of the filing on a motion for transfer,...**matters such as motions to dismiss or to remand, raising issues unique to this particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer.**

MANUAL FOR COMPLEX LITIGATION § 20.131 (4<sup>th</sup> ed. 2006) (footnotes omitted, emphasis added).

1  
2 The case law supports the conclusion that it is the District Court's responsibility to rule on  
3 jurisdiction issues prior to transfer to the MDL.

4 Granting a stay solely based on the existence of a factually related MDL proceeding,  
5 without undertaking an individualized analysis of subject matter jurisdiction, would  
6 run counter to established case law, congressional intent, and JPML Rule 1.5, all of  
7 which contemplate a district court will act to resolve threshold jurisdictional  
8 concerns.

9  
10 *Pennsylvania v. TAP Pharmaceutical Products, Inc.*, 415 F.Supp.2d 516, 521 (E.D.  
11 Pa. 2005).

12  
13 While Defendants cite cases in which courts have issued a stay rather than decide pending  
14 motions, numerous other courts have proceeded differently, particularly when the pending motion  
15 asks the court to examine whether there is any jurisdictional basis at all for retaining the case in  
16 federal court. *See, e.g. Illinois Municipal Retirement Fund v. Citigroup, Inc.*, 391 F.Supp.2d 844,  
17 851 (7<sup>th</sup> Cir. 2005) (holding "we find nothing absurd in the district courts individually evaluating  
18 their own jurisdiction. Furthermore, Congress has indicated a preference for remands based on  
19 such individualized jurisdictional evaluations and a tolerance (finding that it is in the interest of  
20 judicial economy to rule on the motion to remand before transfer."); *Anderson v. Merck & Co.*,  
21 417 F.Supp.2d 842, 844 (E.D. Ky. 2006) (finding that it is in the interest of judicial economy to  
22 rule on the motion to remand before transfer."); *Comes v. Microsoft Corp.*, 403 F.Supp.2d 897,  
23 904 (S.D. Iowa 2004) (finding lack of jurisdiction and thus holding decision to stay proceedings  
24 would be inappropriate); *Farkas v. Bridgestone/Firestone, Inc.*, 113 F.Supp.2d 1107, 1115 (W.D.  
25 Ky. 2000) (holding "the jurisdictional issue must be resolved before deciding whether to stay or  
26 transfer the case to the MDL panel"); *Stern v. Mutual Life Insurance Co.*, 968 F.Supp. 637, 639  
27 (N.D. Alaska 1997) ("It is incumbent upon a court whose subject matter jurisdiction is questioned  
28 to make a determination as to whether it has, or does not have, jurisdiction over the action.");

1 *People v. Trans World Airlines*, 720 F.Supp. 826, 829 (S.D. Cal. 1989) (“Granting a stay pending  
2 resolution of motions before the Judicial Panel on Multidistrict Litigation...is impractical, because  
3 neither action is binding on this court if we do not have subject matter jurisdiction.”).

4 Indeed, one of the principal cases upon which Defendant relies in support of their stay  
5 application actually supports Plaintiffs’ position that a stay is in appropriate under the  
6 circumstances here. In *Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D. Cal. 1997), it was  
7 plaintiffs, not defendants, who moved to stay the action pending a decision by the JPML as to  
8 whether to create an MDL case. Because that case had been filed in federal court, there was no  
9 question of federal jurisdiction, as exists here. The only issue, in that case, was whether judicial  
10 economy and efficiency would best be served by the district court staying discovery and other  
11 pretrial proceedings pending the outcome of the JPML decision to consolidate all federal cases in  
12 one MDL court.

13 In contrast, here the instant case was not filed in federal court, but rather was improperly  
14 removed from state court. The stay herein is sought to prevent this Court from deciding the basic  
15 jurisdictional question. The court in *Rivers* distinguished its decision from two cases denying a  
16 motion to stay pretrial proceedings, on the basis that it was not necessary to resolve any basic  
17 jurisdictional issues at the outset of the litigation. *Rivers*, 980 F.Supp. at 1361-1362. Accordingly,  
18 *Rivers* actually indirectly supports the position that resolving the “basic jurisdictional issue” in this  
19 case at the outset is necessary and truly advances judicial economy and efficiency.

20 As shown in its Memorandum in support of Remand, Plaintiffs brought this action to  
21 recover damages incurred by them under state law theories of recovery that do not involve  
22 substantial and disputed federal questions and any federal defenses such as preemption claimed by  
23 Defendant do not thereby justify federal jurisdiction. Issuing a stay, instead of deciding the issue

1 of this Court's jurisdiction, raises significant federalism and comity concerns that ought to be  
2 considered immediately rather than delayed for an MDL court focused on resolving the litigation  
3 of numerous other individual personal injury cases. It is hardly conservative of judicial resources  
4 for this Court to rule on defendants' motion to stay, allow the JPML to rule on Defendants' request  
5 for transfer, and then force the transferee court to rule on Plaintiffs' pending motion for remand.  
6 Certainly it is more efficient for this Court to go forward with the jurisdictional inquiry at this  
7 stage than to delay resolution of an issue which may divest this Court, the JPML and the transferee  
8 court of jurisdiction over the matter.

9 It can hardly be considered a waste of judicial resources for a federal court to conduct a  
10 proper and mandatory inquiry into its powers under Article III to hear a matter. Transferring this  
11 case to the MDL panel is an act that requires jurisdiction. Because of the significant federalism  
12 and state sovereignty concerns at stake here, Plaintiffs contend that this Court should decide  
13 Plaintiffs' Motion to Remand to state court based on the lack of federal jurisdiction, rather than  
14 staying this case and allowing a lawsuit with questionable federal basis to remain in federal court.

## 15 **II. THE DEFENDANTS WILL FACE NO HARDSHIP IF STAY IS DENIED.**

16 Defendants argue they will be prejudiced if the Court refuses to grant the stay because they  
17 will be forced to engage in duplicative discovery and motion practice. As mentioned earlier, this  
18 case is unlike all others currently pending in the MDL proceedings. The cases currently in the  
19 MDL are personal injury cases involving issues of general negligence and strict product liability  
20 proof, causation, and damages. Plaintiffs' cases involve violations of California state statutory and  
21 common law which will require significant discovery on issues involving Defendants' conduct  
22 toward them. While some evidentiary proof may overlap, much discovery is required by Plaintiffs  
23 to prove claims unique to their cases. This will require specific discovery that has not been done to

1 date in the Avandia MDL, nor will it be done because these aspects would not pertain to those cases  
 2 in the MDL. There is no risk that Defendants will have to “reinvent the wheel” with regard to  
 3 discovery of any overlapping issues because the benefits of consolidated discovery will be available  
 4 in state courts as well as federal courts.

### 5 **III. STAYING PLAINTIFFS’ LITIGATION EFFORTS AT THIS TIME WILL** 6 **PREJUDICE PLAINTIFFS**

7  
 8 The specific discovery this case requires is unique to the factual circumstances of Plaintiffs,  
 9 and California statutory and common law. Therefore, there is simply no reason to delay remand to  
 10 the state court for that case specific discovery and adjudication under state law. The MDL  
 11 proceedings would be of limited value for these Plaintiffs and Plaintiffs will suffer substantial  
 12 hardship if required to incur the certain delay. By the Court ordering remand, this case can move  
 13 forward immediately in state court, expediting justice for Plaintiffs and permitting the state of  
 14 California to preserve its interest in these matters.

### 15 **CONCLUSION**

16  
 17  
 18 For all the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants’  
 19 motion for a stay so that it may first inquire into and decide the fundamental jurisdiction question.

20 Dated: December 12, 2007

Respectfully submitted,

21  
 22  
 23 /s/

24 David C. Andersen (Bar No. 194095)

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Donald. F. Zimmer  
Krista Cosner  
Drinker Biddle & Reath LLP  
50 Fremont Street, 20<sup>th</sup> Floor  
San Francisco, CA 94105

Dated: December 12, 2007

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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